IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 26TH FEBRUARY 2007 / 7TH PHALGUNA 1928

RSA.No. 1089 of 2005()

---

AS.51/1996 of ADDL.SUB COURT,KOTTAYAM
OS.213/1990 of MUNSIFF COURT, ETTUMANOOR

.....

APPELLANTS/APPELLANTS/PLAINTIFFS

---

1. MATHEW MATHEW, S/O.MATHEW MATHEW,
   ONESSERIL HOUSE, MANNANAM, ATHIRAMPUZHA,KOLLAM.

2. AELYKUTTY MATHEW, W/O.K. MATHEW,
   ONESSERIL HOUSE, MANNANAM, ATHIRAMPUZHA, KOLLAM.

BY ADV. SRI.M.J.THOMAS

RESPONDENTS/ RESPONDENTS/DEFENDANTS

---

1. STATE OF KERALA, REPRESENTED BY THE
   DISTRICT COLLECTOR, KOTTAYAM.

2. THE EXECUTIVE ENGINEER(B&R), PWD,
   KOTTAYAM.

3. THE PRINCIPAL, MEDICAL COLLEGE HOSPITAL,
   ARPOOKARA, KOTTAYAM.

4. GEEVARGHESE KURIAN, RESIDING AT
   KADUMBISSERIL (THEKKEDATH), MANNANAM, ATHIRAMPUZHA
   KOTTAYAM. (EXPIRED)

   It is reported that LRs of the deceased 4th respondent are not necessary party to this appeal as per order dated 15/11/06 in IA 249/06

5. LUKA KURIAN, RESIDING AT THEKKANIYIL HOUSE,
   THELLAKOM, PERUMBAIKADU, KOTTAYAM.

BY GOVERNMENT PLEADER L.G.SURESH BABU

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 26/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**M.SASIDHARAN NAMBIAR,J.**

---

R.S.A .NO. 1089 OF 2005

---

Dated 26th February 2007

**J U D G M E N T**

Plaintiffs in O.S.213/1990 on the file of Munsiff court, Ettumanoor are appellants. Respondents are the defendants. Appellants filed the suit seeking a decree for declaration of right of way by easement of prescription and necessity and for consequential decree for injunction. Appellants contended that 38 cents in survey No.951/2 of Athirampuzha village belonged to their uncle Thomas Karimpukalayil and under Ext.A1 sale deed dated 2/2/1961 he assigned the property in their favour and while so, 10 cents of the property was gifted to Polaparayil Aleyamma in 1968 and Government acquired 3 cents of the property for the purpose of Kottayam Medical College and as a result of severance of the property by acquisition, no way is available to the remaining property in the possession of the appellants and the way to the plaint schedule property is from the southern panchayat road where a gate has been

installed by the Medical college and that way is being used by plaintiffs and their predecessors for the last more than 50 years peaceably openely and as of right and as an easement and they are therefore entitled to a declaration of right of way by easement of prescription as well as necessity. Defendants disputed claim and contended that there is no way to plaint schedule property towards south and property of the Medical college on the southern side of plaint schedule property was enclosed by a fence and appellants are not entitled to decree for declaration or injunction. Learned Munsiff framed necessary issues. On the evidence of Pws.1 to 5 and Exts.A1 to A9 and DW1 and Exts.B1 to B6 and Ext.C1, learned Munsiff found that appellants did not establish a right of way either by easement of prescription or easement of necessity and therefore held that they are not entitled to the decree sought for. Suit was dismissed. Appellants challenged the decree and judgment before Sub court, Kottayam in A.S.51/96. Learned Sub Judge on re-appreciation of evidence, confirmed the decree and judgment passed by learned Munsiff and dismissed the appeal. Before the learned Sub Judge appellants did not press the claim for

right of easement by prescription and only contended that they have a right of easement by necessity.

2. This second appeal is filed challenging the concurrent decree and judgment passed by courts below. Learned counsel appearing for appellants vehemently argued that evidence establish that the only way available to the plaint schedule property is from the southern panchayat road which runs through the property of Medical college and When southern portion of the property covered by Ext.A1 was acquired, appellants lost access to the remaining property and therefore courts below should have upheld the claim for right of easement by necessity.

3. On hearing learned counsel and on going through the judgments of courts below, I do not find any substantial question of law involved in the second appeal. Right of easement by prescription though claimed in the suit, before the first appellate court it was given a go by. Only right of easement by necessity was pressed.

4. Appellants claim title and possession of the property under Ext.A1. Ext.A1 which came into existence in 1961 shows the eastern boundary of the property

covered under Ext.A1 was "Nattuvazhy" (a public way). Appellants cannot contend that the way to plaint schedule property was from the southern side or that by severance of property that way was lost. As rightly found by courts below right of easement by necessity would arise only when there was a splitting up of the tenement whereunder property left with appellants cannot be enjoyed without making use of the acquired property as a way. When Ext.A1 shows that there is access to the remaining property when the southern portion of Ext.A1 property was acquired, appellants cannot claim a right of way through the acquired plot. As per Ext.A1, the eastern boundary is a way. It is therefore clear that at the time of splitting up of the property by acquisition in 1963, there was access to the remaining property. Hence right of easement by necessity cannot be claimed through the acquired property. Subsequent splitting up of tenement by execution of gift deed in 1968 will not enable appellants to claim a right of way through the acquired property. As rightly found by courts below right of easement by necessity could be claimed only over the eastern property, which was gifted to Aleyamma in 1968. Appellants are not entitled to

claim a right of easement by necessity over the acquired property, which was split up five years prior to splitting up of tenement in 1968. Appellants are not entitled to get the right of easement by necessity claimed in the suit.

No substantial question of law is involved in the appeal. Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.